NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

SYED MOUZZAM ALI, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent	B077712 (Super. Ct. No. BC008240) (Filed May 9, 1995)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Reversed.

Rosario Perry and Marie E. Berglund for Plaintiff and Appellant.

James K. Hahn, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, L. Wayne Mooney and Gloria Dabbs Mann, Deputy City Attorneys, for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Syed Mouzzam Ali owned a hotel, known as the Ferraro, at 2065 West 6th Street in Los Angeles. In November 1988, a fire gutted the hotel. Appellant desired to demolish the building and sell the land. In January 1989 he applied to defendant and respondent City of Los Angeles for a demolition permit. The City withhold the permit, based on information that the Ferraro was a single room occupancy (SRO) hotel, a

type of residential hotel defined by City ordinance according to the limited percentage of individual units having private bath and toilet facilities. In order to preserve the supply of such low income housing, the City ordinance prohibited for 180 days (periodically renewed) the issuance of a demolition permit for SRO hotels, except by order of the Building and Safety Department upon a determination the building was infeasible to repair, or upon agreement of the owner to replace with similar housing, or upon a showing of extreme hardship.

Eventually, but not until August 1990, the City determined the Ferraro was not an SRO hotel and permitted its demolition. In the meantime, however, commencing July 1989, a series of arson fires occurred in the building, the City determined appellant was not providing adequate security, and the City contracted for 24-hour security, with the cost to be assessed against the property, pursuant to section 91.8906 of the Los Angeles Municipal Code (L.A.M.C.). In March 1990, August 1990, and January 1991, the City Council approved three assessments, totaling about $375,000, for the cost of this security protection.

In the present action appellant sought a writ of administrative mandate (Code Civ. Proc., § 1094.5) to set aside the assessments against the property, and other relief. Appellant argued that the assessments were improper because the delay in issuing the demolition permit was unlawful, and if the City had timely issued the demolition permit, the need for security protection would not have arisen. Appellant contended that the City's initial determinations that the Ferraro was an SRO hotel and that is was feasible to repair were subsequently

conceded to be wrong. Appellant further contended that even if the City had been correct that the Ferraro was an SRO hotel, the City wrongfully delayed the permit by suggesting the SRO ordinance required appellant to agree to replace the building with similar housing. Appellant, who desired to get out of the residential hotel business and sell the land to a developer, contended the City's condition violated the Ellis Act, Government Code section 7060, subdivision (a), which provides in pertinent part, "No public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease."

The trial court denied the writ of administrative mandate. The court concluded that despite the City's August 1990 concession that the Ferraro was not an SRO hotel, substantial evidence supported the earlier contrary determination, therefore the City did not abuse its discretion. The trial court made no finding as to the Ellis Act, despite appellant's objection that the statement of decision failed to address it.

CONTENTIONS

Appellant raises a variety of contentions, among them that the delay in issuing the demolition permit violated the Ellis Act. Substantially agreeing with the latter contention, we conclude the trial court committed reversible error in failing to address the Ellis Act issues. We reverse for further proceedings.

ELLIS ACT
Background

The City's SRO ordinance was enacted to prevent the potentially irreversible loss of a type of housing deemed essential to the low income housing market, SRO hotels. The ordinance defines an SRO hotel to be an apartment building, hotel, or other structure containing six or more guestrooms in which 30 percent or more of the units do not contain a private bath and toilet facility within the unit. The ordinance prohibits for 180 days the issuance of a demolition permit for SRO hotels unless the Building and Safety Department orders demolition upon a determination the building is infeasible to repair. Absent such an order from the Department, the ordinance provides, "No building permit shall be issued for any new construction on a lot where a Single Room Occupancy Hotel was demolished . . . unless the applicant agrees to replace on such lot all of the single room occupancy units that were on the lot prior to the demolition."

The Department had information that, prior to its being gutted by fire, the Ferraro had a configuration of rooms and bath and toilet facilities that made it an SRO. The Department also determined that the damaged structure was feasible to repair. Appellant learned by a June 14, 1989 letter from Councilwoman Molina, in whose district the hotel was located, that a demolition permit could be obtained by City Council resolution if appellant agreed to provide replacement low income housing as part of the proposed new mixed use project for the lot. In other words, the City's delay of appellant's demolition permit was based on the assumptions that the Ferraro

was subject to the SRO ordinance and that the SRO ordinance validly required replacement low income housing.

In a superior court complaint filed September 5, 1989, by appellant's prior counsel, appellant contended (1) the Ferraro was not an SRO hotel, because prior to its substantial destruction by fire more than 30 percent of its rooms had private bath and toilet, (2) the building was not feasible to repair, and (3) because appellant did not wish to remain in the residential rental business but to sell the lot without a building upon it, application of the SRO ordinance violated the Ellis Act. That complaint was dismissed in March 1990 for failure to exhaust administrative remedies.

In the subsequent administrative hearings conducted by the Building and Safety Department in May and June of 1990 on appellant's appeal from denial of the demolition permit, the main issues were the feasibility of repair and the number and configurations of bathroom facilities. Those appeals were resolved against appellant upon substantial conflicting evidence. Nevertheless, on August 1, 1990, the director of the Rent Stabilization Division informed appellant that as a result of substantial questions raised in the administrative hearings and additional investigation and evaluation based on new evidence, she concluded the Ferraro was not an SRO hotel; the City's objections to the demolition permit were dropped. The permit issued, and the building was demolished August 15, 1990.

In January 1991, the third of the three assessments for security protection came before the City Council for confirmation. Appellant argued it was unfair to assess these

security costs in light of the revelation that the Ferraro was not an SRO hotel; he argued the delay of the demolition was based on a mistake, and that a timely demolition would have prevented the need for expensive security. On behalf of appellant's wife who had an interest in the property, another attorney argued the City should admit its mistakes and withdraw the assessments. In his written statement he urged that the earlier condition imposed by the City that appellant replace low income housing on the property violated the Ellis Act.

Analysis

The City Contends the Ellis Act is moot because the City eventually decided the Ferraro was not an SRO hotel and permitted its demolition. Similarly, the trial court may have thought the Ellis Act issue was mooted by the court's finding that, at the time of the administrative hearings, there was substantial evidence to support a finding the Ferraro was an SRO hotel, even though the City subsequently reversed its position.

We disagree. The City's mootness argument is based on an illogical conclusion that is the City eventually decided the Ferraro was not an SRO hotel, then the City never applied the SRO ordinance to the Ferraro. On the contrary, if appellant is correct that application of the SRO ordinance violates the Ellis Act, the *delay* of the demolition permit based on the SRO ordinance was improper, just as denial would have been improper if the Ferarro was an SRO hotel. If appellant can prove that he could and would have promptly demolished the building if he had been promptly granted a permit, and therefore

the unusual security protection measures would never had been necessary, at least a portion of the assessments against the property should be set aside. Appellant should not have to bear the cost of security protection which could have been avoided. The assessment procedure in L.A.M.C. section 91.8906 if for defraying the cost of "necessary" securing of property.

Javidzad v. City of Santa Monica (1988) 204 Cal.App.3d 524, strongly supports appellant's Ellis Act argument. There, a local rent control law required that in order to obtain a permit to demolish controlled rental units a landlord must show that repair is not economically feasible or that redevelopment of the property would include 15 percent low income housing. The court held the Ellis Act preempted the local law and that the owner was entitled to issuance of a demolition permit without having to comply with the local law conditions. The court rejected the city's contention that the condition merely regulated the future use of the property and was therefore consistent with Government Code section 7060.7, subdivision (1). The court held the local law infringed on the landlord's right to go out of the residential rental business which is protected by the Ellis Act. (*Javidzad v. City of Santa Monica, supra,* 204 Cal.App.3d at pp. 530-531.) The court held that to deny a demolition permit, thereby disallowing redevelopment of the property otherwise allowed by local zoning and planning rules, would violate the Ellis Act. (*Id.* at p. 531.; see also *City of Santa Monica v. Yarmark* (1988) 203 Cal.App.3d 153; *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072.)

Similarly here, the SRO ordinance prevents a landlord who desires to go out of the SRO hotel business from demolishing the hotel and redeveloping the property, and instead requires the landlord either to repair the hotel and remain in business, rebuild with replacement units, or establish financial hardship. The SRO ordinance suffers from the same defects as the Santa Monica rent control law in *Javidzad*.

The City contends that appellant did not exhaust administrative remedies or timely raise the Ellis Act. We disagree. Appellant raised the Ellis Act in the superior court in his first amended complaint and in one of his trial briefs. Appellant was excused from raising the Ellis Act in the administrative hearings before the Building and Safety Department, because it is doubtful the legislatively-enacted SRO ordinance could have been declared invalid by the Building and Safety Department acting administratively. (See *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 828-829; *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 619.) Even assuming that the City Council should be given an opportunity to decide in the first instance whether its own ordinance is unenforceable (see *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 91-96), that was done in this case through the argument of appellant's co-owner. Because the same parcel of property was involved, and the City Council was put on notice of the Ellis Act problem at the third assessment hearing, appellant is not precluded from raising the Ellis Act issue in the trial court and on appeal.

The theory of appellant's case is that is the demolition permit had not been delayed because of the SRO

ordinance, appellant would have promptly demolished the building, and the problems of the arson fires in the structure and need for 24-hour security guards would not have arisen. Appellant will have the burden to prove that had the City not imposed the condition that appellant replace the building with low income housing, appellant could and would have complied with all other legitimate conditions of a demolition permit and could and would have demolished the building before the need for City-imposed security measures arose. The trial court may determine, taking into account delays attributable to appellant and delays attributable to violation of the Ellis Act, what portion of the assessments for security protection should be set aside by writ of mandate.

OTHER ISSUES

In addition to his Ellis Act argument, appellant raises several procedural arguments against the City Council's approval of the assessments and the trial court's denial of the writ of administrative mandate. We find appellant's procedural arguments without merit. We discuss them only briefly.

Administrative Record

Appellant contends that the administrative record lodged with the trial court in two parts was incomplete and not properly authenticated. A legal secretary in the City Attorney's Office certified that the first part consisted of the Building and Safety Department's file No. 900823, City Council file No. 89-1746, and transcripts of hearings of the Building and Safety Commissioners held

June 12, 1990, and of the City Council held January 8, 1991. A deputy city attorney certified that the second part contained public records of the Building and Safety Department concerning the subject property; the delay in producing the second part was explained by the December 14, 1992, declaration of a senior investigator for the Building and Safety Department concerning the difficulty of locating the microfiched file in a large warehouse.

Appellant did not formally object in the trial court that the administrative record was hearsay or unauthenticated an so has waived this issue on appeal. (*Hand v. Board of Examiners, supra,* 66 Cal.App.3d 605, 613; *Hawthorne Savings & Loan Assn. v. City of Signal Hill* (1993) 19 Cal.App.4th 148, 155, fn.1.)

There is no merit to appellant's suggestion the administrative record was incomplete. The fact that appellant belatedly sought to introduce other evidence, regarding weed abatement, from the Department of Public Works does not show the record of the Building and Safety Department proceedings was incomplete. (Code Civ. Proc., § 1094.6, subd. (c).)

The trial court was within its discretion in denying appellant's motion to augment the administrative record with post-administrative-hearing deposition testimony of employees Crisp and Wong. The court found appellant could with reasonable diligence have produced such evidence at the administrative hearing. (Code Civ. Proc., § 1094.5, subd. (e); *Cooper v. Kizer* (1991) 230 Cal.App.3d 1291, 1300.) As to Rent Stabilization Division Director Zeidman's post-administrative-hearing letter reversing the City's position on whether the Ferraro was an SRO

hotel, both parties rely on it without objection and we have taken it into consideration in this opinion.

Notice of SRO Status

Appellant contends he was denied constitutional due process notice because the City or the SRO ordinance itself did not provide for appellant to be given notice and an opportunity for a hearing *before* "classifying" the Ferraro as an SRO hotel. There is no merit to this contention, because the SRO ordinance was of general application and contained a clear objective standard defining an SRO hotel: "An apartment building, hotel, or other structure containing six or more guest rooms in which thirty percent (30%) or more of the units do not contain a private bath and toilet facility within the unit." As aptly stated by one of the panelists at appellant's May 31, 1990, administrative hearing, the owner of a hotel can be expected to know whether its own hotel contains such a combination of rooms, baths, and toilets. It was not up to the City to provide advance notice and hearing to the owner. (See *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613.) Once appellant learned that the City considered the Ferraro an SRO hotel, appellant had the opportunity for administrative hearings to contest that classification, and he exercised that opportunity between March and June of 1990.

Notice of Assessment Hearings

Appellant's brief summarily asserts that the City failed to prove appellant was given notice of the three City Council hearings to confirm the three assessments against the property. On the contrary, the administrative

record (which we held *ante* was properly received by the trial court) contains substantial evidence that appellant was sent notices of the hearings by certified mail at his home address which he had given the tax assessor for notice purposes. This satisfied due process notice requirements. (See *Hankla v. Governing Bd.* (1975) 46 Cal.App.3d 644, 654-655.)

In his reply brief appellant contends the City's own proof showed the notice of the March 1990 assessment hearing was mailed less than 10 days before the date set for hearing, contrary to the requirement of L.A.M.C. § 91.8906(c)(2). This assessment was recorded on April 30, 1990. Appellant failed to show he challenged it within 90 days of its recording, as required by L.A.M.C. § 91.8906(c)(5).

Amendment of Complaint

Appellant's first amended complaint contained causes of action against the City for writ of mandate, deprivation of civil rights, and interference with contract. On the eve of trial, appellant sought leave to amend to add two causes of action for negligence and inverse condemnation, which the trial court denied. Only the cause of action for writ of mandate went to trial.

We need not decide appellant's contention that the trial court abused its discretion in denying leave to amend to add the new causes of action. After the trial court denied the writ of mandate, the parties entered a stipulation for summary judgment on all of appellant's causes of action, so that this matter could be immediately appealed. They stipulated that the issues regarding the

writ of mandate were dispositive, and that if the judgment as to the writ of mandate were reversed on appeal, the City would not object to setting aside the judgment as to the remaining causes of action. We leave to the trial court to reconsider these issues in its discretion in light of the new circumstance of this reversal.

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion. Costs on appeal are awarded to appellant.

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VOGEL (C.S.),J.

We concur:

WOODS (Arleigh), P.J. EPSTEIN, J.